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Joceline Tan Poh Choo & Ors v V Muthusamy

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–4 OF 2004(P)
NIK HASHIM, AUGUSTINE PAUL AND ZULKEFLI FCJJ
7 NOVEMBER 2008

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Civil Procedure — Appeal — Appeal to Federal Court — Conditions for appeal — Construction of s 96(a) of the Courts of Judicature Act 1964 — Whether limbs separate and mutually exclusive — Whether question framed for determination of Federal Court within s 96(a) of the Courts of Judicature Act 1964

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Civil Procedure — Appeal — Appeal to Federal Court — Conditions for appeal — Prima facie case for success, how determined — Courts of Judicature Act 1964

E

Civil Procedure — Appeal — Appeal to Federal Court — Framing of questions — Framing of questions for determination by Federal Court, nature and manner of

F

The respondent was sued over a property transaction. The appellants wrote and published a newspaper report on the property transaction proceedings. The respondent alleged that the said report defamed him and sued the appellants for defamation. The appellants relied on the defence of absolute
G privilege under s 11(1) of the Defamation Act 1957. The High Court found that the report was primarily based on the amended statement of claim and was defamatory. The judge also found that the report was not fair and accurate and not contemporaneous. Accordingly, he ruled that the defence of absolute privilege was not available to the appellants and awarded damages to
H the respondent. The appellants appealed to the Court of Appeal. The Court of Appeal agreed with the findings of the High Court that the report was defamatory of the respondent. The Court of Appeal did not make any finding as to whether the report was fair and accurate though the court found that it was contemporaneous. The Court of Appeal further held that where the
I report contains extracts from pleadings, it must have first been read out in open court. Thus, publication by the appellants of part of the amended statement of claim which was not read out in open court, was not within the scope of the protection given by s 11(1). The appellants' appeal was dismissed but the quantum of general damages was reduced and the award of

aggravated damages set aside. The appellants then obtained leave to appeal to the Federal Court pursuant to s 96(a) of the Courts of Judicature Act 1964 ('the Act'). In the Federal Court, the crux of the appeal was whether the appellants had properly framed their question for appeal.

Held, dismissing the appeal with costs:

(1) Section 96(a) of the Act contains two limbs. The first limb — limb (a) — encompassing the words 'question of general principle decided for the first time' — refers to a decision of the Court of Appeal for the first time on a question of general principle. The second limb — limb (b) — comprising the words 'a question of importance upon which further argument and a decision of the Federal Court would be to public advantage' refers to two or more previous decisions of the Court of Appeal on the same issue which are in conflict, wrong or made in ignorance of a binding precedent or made following a decision of the Federal Court which is vague or wrong. Therefore, a decision of the Federal Court would be to public advantage in order to resolve any confusion (see paras 13–14).

(2) Both limb (a) and limb (b) are separate. Since they cater for two distinct circumstances they are mutually exclusive. The words '… which the Federal Court has not previously decided …' in limb (a) in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 confuses the proper meaning to be accorded to both the limbs. They ought to be replaced with the words '… decided by the Court of Appeal for the first time …' as contemplated by s 96(a). That would remove any confusion that may arise and bring into proper focus the distinction between both the limbs (see para 15); *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 distinguished.

(3) Whether a point if decided for the appellant would result in a prima facie case for success in the appeal, would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. The question must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. If the answer to the proposed question is obvious in that it will not be in favour of the intending appellant, there would be no basis for a prima facie case for success in the appeal. Where a decision depends on the application of a well-established principle to an individual set of facts,

a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see para 17); *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 referred.

(4) The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal. A question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law may be raised if all the facts necessary to support it have been raised in the Court of Appeal (see para 17); *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225; *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513 and *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517 referred.

(5) If there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. The Federal Court may decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted, with the result that the appeal must be dismissed without a consideration of its merits (see paras 18 & 20).

(6) In the instant case, part (a) of the appellants' question was based on an assumption that the report was fair and accurate when the Court of Appeal made no specific finding on such a vital ingredient to be proved in the defence of absolute privilege. Thus, this part of the question, as framed, was irregular. The portion of the question referring to the inclusion of an extract of the pleadings in the report was not necessary, as the Court of Appeal had ruled it could be included subject to fulfillment of the requirement in part (b) of the question. Part (b) of the question was in order as it sought to reverse a specific finding made by the Court of Appeal. However, an answer to this part of the question in favour of the appellants would not have the effect of reversing the judgment of the Court of Appeal as the critical question as to whether the report was fair and accurate would remain unanswered. Such an answer was a prerequisite in order for the appellants to succeed in the defence of absolute privilege as provided by s 11(1). The answer to the question would only be of academic value as it would not affect the position of the appellants. It was thus not a proper exercise of authority for the Federal Court to engage itself in answering the question as framed (see para 22).

[Bahasa Malaysia summary

Responden telah disaman kerana transaksi hartanah. Perayu-perayu telah menulis dan menerbitkan laporan akhbar tentang prosiding transaksi hartanah tersebut. Responden mengatakan bahawa laporan tersebut telah memfitnahnya dan menyaman perayu-perayu kerana fitnah. Perayu-perayu telah bergantung kepada pembelaan perlindungan mutlak di bawah s 11(1) Akta Fitnah 1957. Mahkamah Tinggi mendapati bahawa laporan tersebut terutamanya berdasarkan pindaan penyataan tuntutan dan adalah berunsur fitnah. Hakim juga mendapati bahawa laporan tersebut tidak adil dan tepat dan bukan terkini. Sewajarnya, beliau memutuskan bahawa pembelaan perlindungan bersyarat tidak boleh digunakan oleh perayu-perayu dan mengawardkan ganti rugi kepada responden. Perayu-perayu telah merayu ke Mahkamah Rayuan. Mahkamah Rayuan bersetuju dengan penemuan Mahkamah Tinggi bahawa laporan tersebut memfitnah responden. Mahkamah Rayuan tidak membuat apa-apa penemuan berhubung sama ada laporan tersebut adil dan tepat meskipun mahkamah mendapatinya adalah terkini. Mahkamah Rayuan selanjutnya memutuskan bahawa laporan tersebut mengandungi petikan daripada pliding, ia perlu dibaca terlebih dahulu di mahkamah terbuka. Oleh itu, penerbitan oleh perayu-perayu untuk sebahagian pindaan penyataan tuntutan yang tidak dibaca di mahkamah terbuka, bukan dalam skop perlindungan yang diberikan oleh s 11(1). Rayuan perayu-perayu telah ditolak tetapi kuantum untuk ganti rugi am telah dikurangkan dan award untuk ganti rugi teruk telah diketepikan. Perayu-perayu kemudiannya telah memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan menurut s 96(a) Akta Mahkamah Kehakiman 1964 ('Akta tersebut'). Di Mahkamah Persekutuan, pokok rayuan adalah sama ada perayu-perayu telah membentuk persoalan mereka dengan betul untuk rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 96(a) Akta tersebut mengandungi dua bahagian. Bahagian pertama — bahagian (a) — mengandungi perkataan-perkataan 'question of general principle decided for the first time' — merujuk kepada keputusan Mahkamah Rayuan untuk pertama kali berhubung persoalan prinsip am. Bahagian kedua — bahagian (b) — mengandungi perkataan-perkataan 'a question of importance upon which further argument and a decision of the Federal Court would be to public advantage' merujuk kepada dua atau lebih keputusan terdahulu Mahkamah Rayuan berhubung isu sama yang berkonflik, salah atau dibuat tanpa mengira duluan mengikat atau dibuat berikutan keputusan Mahkamah Persekutuan yang tidak jelas atau salah. Oleh itu,

keputusan Mahkamah Persekutuan memberikan kelebihan kepada orang awam bagi tujuan menyelesaikan apa-apa kekeliruan (lihat perenggan 13–14).

(2) Kedua-dua bahagian (a) dan bahagian (b) adalah berasingan. Memandangkan kedua-duanya digunakan untuk dua keadaan berbeza maka kedua-duanya adalah sama-sama eksklusif. Perkataan-perkataan '… which the Federal Court has not previously decided …' dalam bahagian (a) dalam kes *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 mengelirukan maksud sebenar yang patut digunakan untuk kedua-dua bahagian itu. Kedua-duanya patut digantikan dengan perkataan-perkataan '… decided by the Court of Appeal for the first time …' seperti yang dinyatakan oleh s 96(a). Ini akan menghapuskan apa-apa kekeliruan yang mungkin timbul dan memberikan fokus sebenar perbezaan antara kedua-dua bahagian (lihat perenggan 15); *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 dibeza.

(3) Sama ada suatu perkara jika diputuskan berpihak kepada perayu akan menyebabkan kes prima facie berjaya dalam rayuan, akan bergantung kepada isu yang ditimbulkan dalam rayuan itu dan, oleh itu, berdasarkan sifat dan cara persoalan untuk rayuan dibentuk. Persoalan itu mestilah diungkapkan sedemikian untuk memasukkan poin undang-undang yang mempunyai kesan menentang penemuan yang dibuat terhadap perayu yang berniat itu tanpa apa-apa penilaian selanjutnya ke atas keterangan. Ini sebaliknya bermakna jawapan yang diberikan kepada persoalan itu mestilah bahawa ia mempunyai kesan bertentangan ke atas penghakiman. Jika jawapan kepada persoalan yang dicadangkan adalah jelas di mana ia tidak akan berpihak kepada perayu yang berniat itu, maka tiada asas untuk kes prima facie berjaya dalam rayuan. Di mana keputusan bergantung kepada permohonan prinsip tetap berkenaan set fakta berasingan, rayuan selanjutnya ke Mahkamah Persekutuan tidak berguna jika ia tidak berbuat apa-apa untuk menjelaskan atau memperhalus prinsip itu, agar ia boleh digunakan dalam keadaan lain di masa depan (lihat perenggan 17); *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 dirujuk.

(4) Persoalan yang dikemukakan mestilah mengaitkan perkara berkaitan penentuan yang telah dibuat oleh Mahkamah Rayuan. Persoalan tidak boleh berdasarkan andaian bahawa penemuan telah dibuat berkaitannya walhal, pada hakikatnya, tiada penemuan sedemikian telah dibuat. Walau bagaimanapun, poin baru undang-undang boleh ditimbulkan jika semua fakta perlu untuk menyokongnya telah ditimbulkan di Mahkamah Rayuan (lihat perenggan 17); *The Minister*

for Human Resources v Thong Chin Yoong and another appeal [2001] 4 MLJ 225; *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513 dan *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517 dirujuk.

(5) Jika tiada prospek kejayaan dalam rayuan itu kedudukan perayu tidak akan terjejas dan tak ada gunanya untuk mendengar rayuan itu. Mahkamah Persekutuan boleh menolak untuk menjawab soalan yang dikemukakan dalam keadaan yang sesuai meskipun pada hakikatnya kebenaran untuk merayu telah diberikan, dengan keputusan bahawa rayuan tersebut mesti ditolak tanpa mempertimbangkan merit-meritnya (lihat perenggan 18 & 20).

(6) Dalam kes ini, bahagian (a) kepada persoalan perayu-perayu adalah berdasarkan andaian bahawa laporan itu adalah adil dan tepat apabila Mahkamah Rayuan tidak membuat apa-apa penemuan khusus berhubung elemen penting yang perlu dibuktikan dalam pembelaan perlindungan mutlak. Oleh itu, bahagian persoalan ini, seperti yang telah dibentuk, adalah di luar aturan. Bahagian persoalan yang merujuk kepada pemasukan petikan pliding dalam laporan tersebut adalah tidak perlu, kerana Mahkamah Rayuan telah memutuskan ia boleh dimasukkan tertakluk kepada pematuhan keperluan dalam bahagian (b) kepada persoalan itu. Bahagian (b) kepada persoalan itu adalah teratur kerana ia memohon untuk mengakas penemuan khusus yang dibuat oleh Mahkamah Rayuan. Walau bagaimanapun, jawapan kepada bahagian persoalan ini berpihak kepada perayu-perayu tidak akan mempunyai kesan mengakas penghakiman Mahkamah Rayuan kerana persoalan kritikal berhubung sama ada laporan tersebut adalah adil dan tepat masih tidak berjawab. Jawapan sedemikian adalah pra syarat bagi tujuan perayu-perayu berjaya dalam pembelaan perlindungan bersyarat seperti yang diperuntukkan oleh s 11(1). Jawapan kepada persoalan itu akan hanya mempunyai nilai akademik kerana ia tidak menjejaskan kedudukan perayu-perayu. Oleh itu ia bukan penggunaan kuasa yang wajar untuk Mahkamah Persekutuan menjawab persoalan seperti yang dibentuk (lihat perenggan 22).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 749–756.

Cases referred to

Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors [2005] 3 MLJ 681 (refd)

Board of Trustees of the Sabah Foundation & Ors, The v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469 (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors [1999] 1 MLJ 257 (distd)

Kredin Sdn Bhd v OCBC Bank (M) Bhd [1998] 3 MLJ 78 (refd)
Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517 (refd)
Loknath Padhan v Birendra Kumar Sahu AIR 1974 SC 505 (refd)
Minister for Human Resources, The v Thong Chin Yoong and another appeal [2001] 4 MLJ 225 (refd)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253 (refd)
Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513 (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257 (refd)
Sun Life Assurance Co of Canada v Jervis [1944] 1 All ER 469 (refd)
Tan Heng Chew & Ors v Tan Kim Hor & Ors [2006] 5 MLJ 313 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Defamation Act 1957 s 11(1)
Rules of the Federal Court 1995 r 137

Appeal from: Civil Appeal No P-02–854 of 2000 (Court of Appeal, Putrajaya)

JA Yeoh (Shearn Delamore & Co) for the appellants.

V Muthusamy (V Muthusamy & Associates) for the respondent.

Augustine Paul FCJ (delivering judgment of the court):

[1] This appeal raises for consideration the nature and manner in which questions ought to be framed for the purpose of an appeal to this court pursuant to s 96(a) of the Courts of Judicature Act 1964 ('s 96(a)').

[2] This appeal was previously heard by this court which had, on 13 May 2005, allowed the appeal of the appellants with costs. Upon an application for a review of the judgment by the respondent under r 137 of the Rules of the Federal Court 1995 the orders made were set aside and the appeal was ordered to be reheard. This is the rehearing of the appeal. The first, second and third appellants are the staff reporter, editor and publisher respectively of *The New Straits Times*. The respondent is an advocate and solicitor practising under the name and style of Messrs V Muthusamy & Co and was at one time a member of the Penang State Assembly.

[3] The appellants published a report entitled 'Lawyer and trader conspired to cheat me, claims driver' in *The New Straits Times* on 12 September 1991. The report reads as follows:

PENANG, Wed.— A lawyer allegedly conspired to cheat an illiterate man who had engaged him to facilitate the purchase of a property in Kulim, Kedah, the High Court was told today.

Driver G Paramasevam claimed that his lawyer V Muthusamy had breached their contract by allowing the land, worth $70,0000, to be transferred to a businessman nine years ago without his knowledge or permission.

He said that when he demanded an explanation from Mr Muthusamy, the lawyer claimed he did not know anything and asked him to leave his office.

He has named in his suit, businessman Varlivell alias V Vadiveloo as the first defendant and Mr Muthusamy as the second defendant.

He claimed he was cheated of the property as a result of the conspiracy between the two defendants and is seeking an order for the return of his property, damages and costs.

At the start of today's proceedings, Mr Paramasevam's counsel Mr Karpal Singh objected to Mr Muthusamy's dual roles as both counsel and defendant in the case. Mr Muthusamy who is represented by Mr Yeap Ghim Guan, is representing Mr Vadiveloo.

However, Mr Muthusamy assured Mr Justice Mohamed Dzaiddin Abdullah that there would be no complications. He also complained to the court that 'several reporters have got hold of the case documents and that is why they have all come here today'.

In his testimony, Mr Paramasevam said he and Mr Vadiveloo were former business partners in Singapore before his return to Penang in 1982.

They had a falling out after he asked Mr Vadiveloo, who is married to his sister's daughter, for the return of a $100,000 loan. However, the latter repaid part of the loan in two instalments of $35,000 each after Mr Paramasevam decided to buy the land.

'On Feb 2, 1982, Mr Muthusamy informed me at his office that the vendor had charged the property to Malayan Banking. He asked me to pay a $35,000 deposit and promised to settle the problem with the bank.'

'Three weeks later, I visited his office where I was asked to sign an agreement. He also reminded me to pay the balance within six months,' he said.

Mr Paramasevam did this on Aug 18 when Mr Vadiveloo repaid him another $35,000 which he immediately handed over to Mr Muthusamy's office.

When he failed to receive the title to the property after three months, he returned to the legal firm but was only asked to sign three letters and told to wait a while more.

'A few days later, I got into financial difficulties and decided to sell the land. I brought a prospective buyer to Mr Muthusamy's office but was told by the clerk that the land did not belong to me.'

After confirming this with a literate friend, Mr Paramasevam confronted Mr Muthusamy but was instead scolded and told to get out of the office.

A 'I phoned Vadiveloo and asked him why he had cheated me. He said he would not leave me alone until I become a beggar.'

The judge set Nov 30 as the next date of hearing.

B **[4]** The respondent claimed that the report meant and was understood to mean that he was a cheat and a dishonest person and was not fit to practise law and to hold public office. The appellants claimed that they were entitled to rely on the defence of absolute privilege under s 11(1) of the Defamation Act 1957 ('s 11(1)').

C

[5] The learned High Court judge found that the report was primarily based on the amended statement of claim and was defamatory. It was also his finding that the report was not fair and accurate and not contemporaneous. Accordingly, he ruled that the defence of absolute privilege was not available D to the appellants. He then allowed the respondent's claim for defamation and awarded a sum of RM300,000 as general damages and RM50,000 as aggravated damages together with costs and interest. The appellants appealed to the Court of Appeal against the whole of the decision of the High Court while the respondent cross-appealed. The Court of Appeal agreed with the E findings of the High Court that the report was defamatory of the respondent. In holding that it was contemporaneous the Court of Appeal then considered the question of whether the report should only be confined to what was publicly heard in open court and not to matters contained in documents filed but not read in open court. It was held that the publication by the appellants F of part of the amended statement of claim which was not read out in open court was not within the scope of the protection given by s 11(1). Accordingly, the appellants' appeal against liability was dismissed. The award of general damages was reduced to RM100,000 and the award of aggravated damages of RM50,000 was set aside. The appellants were awarded half costs G of the appeal and the respondent's cross-appeal was dismissed.

[6] The appellants then filed a notice of motion for leave to appeal to this court as required by s 96(a). They were given leave to appeal on the following question:

H

> Whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings and if so, whether the pleadings should first be read out in the course of the proceedings before publication can be made of the pleadings.

I

[7] The question posed is based on s 11(1) which reads as follows: A

> A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and bona fide comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation. B

C

[8] What is relevant for the purposes of this case is only the first part of the section. In order to succeed on the defence of absolute privilege under this part there must be proof of the following requirements:

D

(a) the report must be fair and accurate and contemporaneous;

(b) the report must relate to a proceeding publicly heard; and

(c) the proceeding must have been heard before any court lawfully exercising judicial authority within Malaysia. E

[9] With regard to requirement (a) the Court of Appeal did not make any finding as to whether the report was fair and accurate though it was found that it was contemporaneous. With regard to requirement (b) it was held that where the report contains extracts from pleadings it must have been read out F in open court. This means that pleadings can form part of the report subject to the stipulation that it must have been read out in open court. Requirement (c) does not need any proof as judicial notice can be taken of the fact that the proceeding was heard in a court lawfully exercising judicial authority within Malaysia. G

[10] It is against the background of what has just been said in the preceding paragraph, that is to say, the elements that must be proved in order to succeed in the defence of absolute privilege and the findings of the Court of Appeal H thereon, that the questions must be framed in order to satisfy the requirements of s 96(a) which reads as follows:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court — I
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided

for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

[11] In commenting on the criteria to be satisfied in an application for leave to appeal under s 96(a), Edgar Joseph Jr FCJ said in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 at p 265:

> To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless both of the following criteria are satisfied by an intending appellant:
>
> (1) the judgment of the Court of Appeal has raised a point of general principle *which the Federal Court has not previously decided* or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and
>
> (2) if the point is decided in favour of the intending appellant, there is a prima facie case for success in the appeal.
>
> (Emphasis added.)

[12] It must be observed, and with respect, that the use of the words '… which the Federal Court has not previously decided …' in criterion (1) may not be an accurate representation of s 96(a). An analysis of the section will make this clear. It contains two circumstances in which an appeal may be made to this court. They are:

LIMB (a) — A QUESTION OF GENERAL PRINCIPLE DECIDED FOR THE FIRST TIME

[13] It is obvious that this is a reference to a decision of the Court of Appeal for the first time on a question of general principle. As s 96 (a) deals with appeals from the Court of Appeal to the Federal Court the word '… decided …' in s 96 (a) refers to a decision that has already been made. The use of the word in the past tense makes this manifestly patent. A decision that has been made can only be a reference to a decision of the Court of Appeal.

LIMB (b) — A QUESTION OF IMPORTANCE UPON WHICH FURTHER ARGUMENT AND A DECISION OF THE FEDERAL COURT WOULD BE TO PUBLIC ADVANTAGE

[14] This limb is an unambiguous reference to an issue upon which there

have been two or more previous decisions of the Court of Appeal. This is made clear by the purpose of limb (a) and the language of this limb itself. A reference to further argument and the fact that a decision of the Federal Court would be to public advantage has in contemplation two or more previous decisions of the Court of Appeal on the same issue which are, for example, in conflict or are wrong or made in ignorance of a binding precedent or made in following a decision of the Federal Court which is vague or wrong. Such a situation would create confusion to the public in the application of the legal principle involved to their affairs. In that event further argument and a decision of the Federal Court on the issue involved would be to public advantage as the confusion would be resolved.

[15] It is thus clear that both limb (a) and limb (b) are separate and as they cater for two distinct circumstances they are mutually exclusive. It is now appropriate to consider the use of the words '… which the Federal Court has not previously decided …' referred to earlier in the passage from *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 in limb (a). It will be recalled that the reference in that limb to the decision made for the first time is to that of the Court of Appeal. It is true that the fact that the Federal Court has not previously decided on a point may mean that it is also the first time that the Court of Appeal has decided on the point as contemplated by limb (a). But, unfortunately, it can also mean that the Court of Appeal has decided on the point previously and that the Federal Court has not decided on it yet thereby making it a case upon which the Federal Court has not previously decided. It is clear by now that limb (b) becomes relevant only when there are two or more decisions of the Court of Appeal on a certain point. Thus the use of the words '…which the Federal Court has not previously decided …' in limb (a) in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 will create confusion in the proper meaning to be accorded to both the limbs. They ought to be replaced with the words '… decided by the Court of Appeal for the first time …' as contemplated by s 96(a). That will remove any confusion that may arise and, additionally, bring into proper focus the underlying distinction between both the limbs.

[16] In an application for leave to appeal an intending appellant must identify the proper limb under which his case falls and address the arguments accordingly.

[17] The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there is a prima facie case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal

is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v OCBC Bank (M) Bhd* [1998] 3 MLJ 78). Leave to appeal on a proposed question will therefore not be granted if there is no hope of success (see *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681). This is logical. If the answer to the proposed question is obvious in the sense that it will not be in favour of the intending appellant there will be no basis for a prima facie case for success in the appeal. Where a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257). The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal as otherwise it will be academic (see *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513). It follows that a question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517). Needless to say, the parties may by consent reframe or amend the question at the hearing stage of the appeal with the approval of the court as demonstrated in *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469.

[18] The corollary is that if there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. In *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 Viscount Simon LC said at p 470:

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

[19] In *Loknath Padhan v Birendra Kumar Sahu* AIR 1974 SC 505 Bhagwati J said at p 508:

> If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the court to engage itself in deciding it. … It would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the other. The court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the court would properly decline to do so.

[20] Thus this court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted with the result that the appeal must be dismissed without a consideration of its merits. This is demonstrated by cases such as *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225, *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 and *Tan Heng Chew & Ors v Tan Kim Hor & Ors* [2006] 5 MLJ 313.

[21] It is now apposite to consider the propriety of the question posed. It is in two parts, that is to say:

(a) Whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings.

(b) And if so, whether the pleadings should first be read out in the course of the proceedings before publication can be made of the pleading.

[22] Part (a) of the question is troublesome. Firstly, it is based on an assumption that the report is fair and accurate when the Court of Appeal had made no specific finding on this vital ingredient to be proved in the defence of absolute privilege. As stated earlier a question posed must relate to a matter upon which a determination has been made by the court. As that is not the position here this part of the question, as framed, is therefore irregular. Secondly, as to the inclusion of an extract of the pleadings in the report it is implicit that the Court of Appeal has ruled it can be included subject to fulfillment of the requirement in part (b) of the question. This aspect of the question is therefore not necessary. Part (b) of the question is in order as it seeks to reverse a specific finding made by the Court of Appeal. Thus what this court can answer is only part (b) of the question. But it must be

immediately realised that an answer to this part of the question in favour of the appellants will not have the effect of reversing the judgment of the Court of Appeal as the critical question as to whether the report is fair and accurate will remain unanswered. Such an answer is a prerequisite in order for the appellants to succeed in the defence of absolute privilege as provided by s 11(1). In short, therefore, the answer to the question will only be of academic value as it will not affect the position of the appellants. It is thus not a proper exercise of authority for this court to engage itself in answering the question as framed.

[23] My learned brothers, Nik Hashim and Zulkefli FCJJ, agree with this judgment. In the upshot the appeal is dismissed with costs. Deposit to the respondent on account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon